Supreme Court, U. S.
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No. .....

In the Supreme Court of the United States

OCTOBER TERM 1980

RICHARD DANIEL FREEMAN,
ROBERT TEMP, and
ALAINE CARTER TEMP,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

If prior to trial, a particular conflict of interest arises which was not present when an initial consent to joint representation was given, must the trial judge in a federal criminal case make a reasonable inquiry to assure:

(a) that representation at trial will be adequate; and/or

(b) that the jointly represented defendants knowingly and voluntarily waive any conflict of interest which may exist.

PARTIES

All appellants below seek a writ of certiorari. Their names are set forth in the caption of this Petition.

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CITATIONS

The opinion of the United States Court of Appeals for the Fifth Circuit appears as *United States v. Freeman, et al.*, 619 F.2d 1112 (5th Cir. 1980).

GROUNDS FOR JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit, affirming Petitioners' judgments of conviction, were filed June 25, 1980.

Petitioners filed a timely Petition for Rehearing which was denied by an order filed August 13, 1980.[1]

1. A timely motion to stay the issuance of the mandate was filed. It was granted on September 2, 1980. The mandate is stayed until October 12, 1980, the stay to continue if this Petition is filed by then.

Jurisdiction of this Petition is conferred on this court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Constitutional provision here involved is

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

U.S. Const., amend 6

STATEMENT OF THE CASE

Petitioners and Walter Wilson Carter were indicted for multiple counts of mail fraud and interestate transportation of stolen property. The indictment charged a scheme to defraud involving the sale by defendants of Texas oil and gas leases, some which were shown not to have been owned by Carter who provided the leases to investors represented by Petitioners. At trial, Petitioners' defense was lack of knowledge of non-ownership, as they contended Carter had represented the leases were available for sale.

Petitioners and Walter Wilson Carter were arraigned on January 16, 1978. All three Petitioners were represented by Anthony Nicholas; Carter was represented by Gerald Goldstein. In view of Nicholas' joint representation of Petitioners, at the arraignment the court required the execution of a court-prepared, standard-form statement of counsel that, *inter alia,* "There is no conflict in interest between the defendants I represent." (referring to *United States v. Garcia,* 517 F.2d 272 (5th Cir. 1975))[2]

The record shows no independent admonition by the trial court advising Petitioners of the hazards of joint representation, or of their rights to separate counsel.

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2. The complete form is included as Appendix 5.

At the end of September 1978, a week before trial was then scheduled to begin, Carter appeared before the trial judge and changed his plea to guilty to one count of the indictment. A plea agreement was read into the record and the trial judge was advised that Carter "has agreed to testify in the government's case-in-chief." (Tr. 868-869)[3]

The nature and extent of Carter's testimony against petitioners was not a factor that counsel, petitioners or the court could have considered at the time of executing the standard form. After it became known that Carter would testify for the government, the trial court took no steps to assure that petitioners continued to desire and consent to joint representation[4] or that they knowingly waived the conflict of interest that existed.

The record clearly reveals "actual," "potential" and "particular" conflicts of interest among petitioners which denied petitioners effective assistance of counsel.

Each of the petitioners testified, but no petitioner could make the all-important decision in a criminal case whether

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3. There is nothing in the record which indicates that Carter's availability as a government witness was known to Petitioners or the court prior to the date his guilty plea was entered. In affirming the conviction, the Fifth Circuit stated:

> Appellants allege that conflicts arose subsequently because Carter's testimony might have hurt one appellant more than the others, one appellant might have impeached the others, and the extrajudicial statements of one appellant might have been used against the others. Appellants' waiver extended to the first two, if not all three, of these alleged conflicts because they were evident during the arraignment discussion. (619 F.2d at 1121-22)

The Fifth Circuit was wrong. That "Carter's testimony might have hurt one appellant more than others" was clearly *not* something evident at arraignment since at that point no one knew or could reasonably anticipate that Carter would testify.

4. At trial, petitioners' counsel, Nicholas, was assisted by his associate, MacDonald, but since he too represented all three petitioners, his participation did not ameliorate the error.

to testify with the advice of independent counsel. Counsel representing all defendants had to be forever mindful of the impact on the jury of having fewer than all testify. This particularized and actual conflict existed only and expressly *because* Carter testified. But for his testimony, each petitioner would have been spared the decision and could have stood silent. Carter's plea bargain and agreement to testify directly resulted in a particular, known conflict of interest not previously apparent.

Moreover, no testifying petitioner was cross-examined by independent counsel to demonstrate the non-involvement of another petitioner. Clearly, counsel could not cross-examine Robert Temp on behalf of Freeman or Mrs. Temp in such a way as to emphasize their minimal involvement without at the same time creating the impression with the jury that Robert Temp was heavily involved.

Petitioners' counsel could not cross-examine Carter fully on behalf of each petitioner. Demonstrating the absence of one petitioner at a particular transaction or discussion would only emphasize the participation of another. Nor could Nicholas cross-examine Carter to highlight individual differences of kind and degree among petitioners. Since each petitioner's individual knowledge (whether some of the leases were not owned) was crucial to the government's proof of a common scheme, this disability was especially prejudicial.

Counsel could not freely argue each petitioner's relative involvement or culpability to the jury and at the time of sentencing for the same reason. Their joint representation throughout the proceedings denied each petitioner a fair trial.

Petitioners filed a timely appeal of their conviction arguing *inter alia* that the trial court's failure to protect their rights in the face of joint representation, after know-

ing of a particular conflict of interest, denied them the effective assistance of counsel. The Fifth Circuit held that the conflict was "speculative," not "actual," and hence no duty to inquire or admonish existed. The Fifth Circuit's holding conflicts with decisions of other Circuits and of this Court.

JURISDICTION BELOW

Jurisdiction of this federal criminal case was conferred on the United States District Court for the Western District of Texas by 18 U.S.C. § 3231.

Jurisdiction of petitioners' appeal to the United States Court of Appeals for the Fifth Circuit was conferred on that court by 28 U.S.C. § 1291.

REASONS FOR GRANTING THIS PETITION

This case squarely presents questions left open by the Court's decision in *Cuyler v. Sullivan,* ——U.S.——, 100 S.Ct. 1708 (1980). The Courts of Appeals do not agree on the procedure that the United States District Courts must follow in criminal cases when faced with joint representation or when those procedures must be invoked, and they are divided on the standards for reversal.

These and related subsidiary questions have sparked suggestions from commentators as well as a proposed rule of Federal criminal procedure.

These questions go to the very core of a fair trial in an adversary system of justice—the quality of representation afforded by counsel for the accused.

The trial court has the responsibility to "protect the right of an accused to have the [effective] assistance of counsel." *Glasser v. United States,* 315 U.S. 60, 71 (1942). Most recently, this issue was faced in a joint representation con-

text in *Cuyler v. Sullivan, supra, a* habeas corpus case challenging a state court's failure to "inquire into the propriety of multiple representation even though no party lodges an objection." 100 S.Ct. at 1716. *Sullivan* held that "nothing in our precedents suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case." 100 S.Ct. at 1717. But the Court indicated that the result might be different where "the trial court knows or reasonably should know that a particular conflict exists . . ." 100 S.Ct. at 1717.

In *Sullivan,* this Court reiterated its endorsement (as an exercise of federal, judicial, supervisory power) of inquiries by trial judges into potential conflicts as provided in proposed Fed. R. Crim. P. 44(c) (requiring that federal trial courts "shall promptly inquire with respect to . . . joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation." See 100 S.Ct. at 1717 n.10). However, the Court observed that some circuits, including the Sixth and Seventh, have explicitly held that no such duty was required. 100 S.Ct. 1717 n.10.

The obvious importance of these issues to the administration of the criminal justice system augers in favor of granting this Petition to address and resolve these issues for federal trial judges who face them daily.

While *Sullivan's* holding of necessity deals only with the constitutional obligation imposed on the states, the instant Petition also implicates this Court's supervisory power over lower federal courts. Petitioners' case falls not only within the correct federal "supervisory" rule, but also within the Sixth Amendment standard, for the trial

court knew or reasonably should have known of a particular conflict.[5]

As the Court observed in *Sullivan,* the Circuits have adopted an array of approaches to the issues raised by joint representation.[6]

Four Circuits hold that where more than one criminal defendant is represented by one attorney, the trial court has an independent, affirmative duty to advise defendants of the risks of joint representation with particularity, to ascertain whether they understand the risks, and (if they continue to desire joint representation) to obtain a voluntary, informed waiver of their right to independent representation. *United States v. Donahue,* 560 F.2d 1039 (1st Cir. 1977); *United States v. Lawriw,* 568 F.2d 98 (8th Cir. 1977), *cert. den.,* 439 U.S. 841 (1978); *Ford v. United States,* 379 F.2d 123 (D.C. Cir. 1967); *United States v. Truglio,* 493 F.2d 574, 579 (4th Cir. 1974).

The Second Circuit holds that although joint representation does not automatically impose a duty to inquire on the trial court, the appearance of a "potential conflict of interest" does require a hearing to determine whether the conflict will prevent each defendant from receiving effective assistance of counsel. *United States v. Carrigan,* 543 F.2d

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5. Not presented is a separate-trial situation (as in *Sullivan*), concerning which this Court observed, "The provision of separate trials . . . significantly reduced the potential for a divergence in their interests." 100 S.Ct. at 1717-18. Presumably the Court had in mind that at separate trials, different tactical approaches could perhaps be taken before different juries to accomodate whatever diverging interests may exist. Petitioners, of course, were tried together. Also, in *Sullivan,* the specific tactic alleged to have prejudiced Sullivan (resting the defense at the close of the prosecution case) was expressly found to have been "on its face a reasonable tactical response to the weakness of the circumstantial evidence presented by the prosecutor." 100 S.Ct. at 1718. This cannot be said of the actual conflict in the case at bar.

6. 100 S.Ct. at 1717 n.10, 1718 n.14.

1053, 1055 (2d Cir. 1976); *United States v. Alberti,* 470 F.2d 878, 881-82 (2d Cir. 1972), *cert. den.,* 411 U.S. 919 (1973).

Other courts hold that the trial court has no independent, affirmative duty to inquire into the possibility of prejudice arising from joint representation, *United States v. Smith,* 550 F.2d 277 (5th Cir.), *cert. den.,* 434 U.S. 841 (1977), *United States v. Steele,* 576 F.2d 111 (6th Cir.), *cert. den.,* 439 U.S. 928 (1978); *United States v. Marrick,* 601 F.2d 921, 929 (7th Cir. 1979), although the Fifth Circuit does require action where the court has "notice of possible impropriety." *United States v. Smith, supra* at 286; but see *United States v. Garcia,* 517 F.2d 272 (5th Cir. 1975) (held: duty to inquire found before disqualifying counsel whose representation was expressly desired by multiple defendants).

Among the circuits that impose a duty to inquire, there is a split as to the standard of review on appeal. Some hold that the failure to conduct an inquiry and to advise defendants of the risks of joint representation imposes a burden on the *government* to show beyond a reasonable doubt that the denial of the defendants' rights is harmless error. *Ford v. United States, supra* at 125 (D.C. Cir.). Other circuits do not shift the burden, and require in cases of joint representation that the *defendant* establish that his waiver of the Sixth Amendment right to counsel was not voluntarily and intelligently made. *United States v. Lawrie, supra* at 104-5 (8th Cir.), and cases cited.

In a review of a state conviction, the Third Circuit held that upon a showing of a possible conflict of interest or prejudice, however remote, joint representation is constitutionally defective without any showing of prejudice by the defendant. *United States ex. rel. Hart v. Davenport,* 478 F.2d 203 (3d Cir. 1973).

At the opposite extreme, the Sixth Circuit holds that the defendant must show the existence of an actual conflict *and* prejudice to him, although it acknowledges in a footnote, "if a real possibility of conflict arises, even during trial, the Court has a responsibility to inform the defendant of the risks involved and remind him that he has the option of changing counsel." *United States v. LaRiche,* 549 F.2d 1088, 1095 n.5 (6th Cir.), *cert. den.,* 430 U.S. 987 (1977).

The Ninth Circuit's stated rule is that the defendant bears the burden of showing an actual conflict and prejudice, *United States v. Kutas,* 542 F.2d 527, 529 (9th Cir. 1976), *cert. den.,* 429 U.S. 810 (1977), and suggests that the burden may be insurmountable where the trial court made sufficient inquiry of counsel and the parties, *United States v. Eaglin,* 571 F.2d 1069, 1086 (9th Cir. 1977), *cert. den.,* 435 U.S. 906 (1978).[7] See also *Cuyler v. Sullivan, supra* at nn.10, 14.

Apparent from the multitude of conflicting holdings in the Circuits respecting joint representation in federal criminal cases is the need for a clear answer to each of the following questions:

1. Does the mere fact of joint representation require affirmative action by the trial court?

2. If not, what events or knowledge trigger a duty of inquiry by the court—must it be a "possible," a "particular" or an "actual" conflict?

3. What is the extent of the admonition or inquiry required of the court?

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7. Our research has not disclosed a case in which the Tenth Circuit has faced the issue of what inquiry a trial judge must make where there is a joint representation, but that court appears to place the burden on defendant to establish an actual conflict of interest. See *United States v. McCoy,* 573 F.2d 14, 17 (10th Cir.), *cert. den.,* 436 U.S. 958 (1978).

4. Can the court satisfy its responsibility by transferring it to counsel? (See the form employed in the case at bar by the trial court, Appendix 5.)[8]

5. Failing an inquiry of the sort required, does the burden shift to the government to show a lack of prejudice?

Proposed Federal Rule of Criminal Procedure 44(c) answers some of these questions. It imposes on a trial court an affirmative duty to admonish jointly-represented defendants and to take measures to assure each defendant's right to counsel unless it finds good cause to believe that no conflict of interest is likely to arise. This Court's promulgation of the Rule evidences the need for a unified approach to a prevalent problem that has split the Circuits and which is at the heart of the criminal trial—the right to competent counsel without divided loyalties. But even if Rule 44(c) takes effect, it will not resolve the question presented by this Petition, because it is silent (even considering the Advisory Committee note) on the second and fifth of these issues which are subsidiary to the Question Presented.

Even if the trial court did conduct an inquiry at the inception of the case, as four Circuits require and as proposed Rule 44(c) would mandate, the conversion of Carter to the government's cause a week before trial—by plea bargain in open court and known to the trial judge—raised

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8. The form the court required counsel to sign contains no express waiver by Petitioners but their signatures appear at its bottom.

It is difficult to imagine that any attorney could execute, in good faith, on the day of arraignment, a statement that (in advance of receipt of any discovery) counsel had discussed his trial strategy and concluded that no conflict exists. It is impossible that he could conclude that even a decision by a defendant (including one of his clients) to plead guilty and testify for the government would not result in a conflict of interest, yet that is exactly what the form states.

both a "potential"[9] and a "particular" actual, known conflict. The Sixth Amendment demanded action at that point.[10] The trial court took none. This Court must resolve the nature and extent of the trial court's duty at the time the particular conflict arose.

We believe at a minimum the trial court was required to admonish petitioners and to obtain a voluntary waiver of their right to independent counsel. The Advisory Committee's note to Rule 44(c) clearly contemplates vigilence on the part of the trial court throughout the proceedings:

> The mere fact that a Rule 44(c) inquiry was conducted in the early stages of the case does not relieve the court of all responsibility in this regard thereafter. The obligation placed upon the court by Rule 44(c) is a continuing one, and thus in a particular case further inquiry may be necessary on a later occasion because of new developments suggesting a potential conflict of interest.

As Mr. Justice Marshall foresaw, in his separate opinion in *Cuyler v. Sullivan,* the Rule 44(c) "inquiry would take place at such an early stage of the proceedings that not all possible conflicts might be anticipated." 100 S.Ct. 1721 n.1. The approach we suggest is consistent with the holdings of a majority of the Circuits. The requirement of so simple a procedure under both the Sixth Amendment and the supervisory power of this Court would not only assure that con-

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9. This was exactly the kind of occurrence which required an inquiry under the rule in the Second Circuit, *United States v. Carrigan, supra; United States v. Alberti, supra.* However, the Fifth Circuit, in this case, labeled it "speculative" and required none.

10. See *Cuyler v. Sullivan,* 100 S.Ct. at 1717 ("Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.") Moreover, petitioners met their burden of demonstrating that an actual conflict of interest adversely affected their lawyer's performance. *Cuyler v. Sullivan,* 100 S.Ct. 1718 n.14 and accompanying text.

stitutionally guaranteed rights are protected but would substantially reduce the burden on appellate courts caused by appeals and extraordinary writs in the plethora of cases which raise these questions.

CONCLUSION

Petitioners respectfully request that this Court grant this Petition and issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

DATED: October 10, 1980

Respectfully submitted,

FRIEDMAN, SHAWN, KIPPERMAN & SLOAN, P.C.

By STEVEN M. KIPPERMAN
JEFFREY S. ROSS

Appendix

1. Opinion of the Fifth Circuit, June 25, 1980.
2. Judgment of the United States Court of Appeals for the Fifth Circuit, June 25, 1980.
3. Order on Petition for Rehearing, August 13, 1980.
4. Order of the Fifth Circuit staying mandate, September 2, 1980.
5. "Attorney's Statement as to Conflicts of Interest."

UNITED STATES of America, Plaintiff-Appellee,

v.

Richard Daniel FREEMAN, Robert Temp and Alaine Carter Temp, Defendants-Appellants.

No. 79-5044.

United States Court of Appeals, Fifth Circuit.

June 25, 1980.

Defendants were convicted before the United States District Court for the Western District of Texas, at San Antonio, Dorwin W. Suttle, J., of mail fraud and interstate transportation of fraudulently taken property, involving sales to investors of nonowned oil and gas leases, and they appealed. The Court of Appeals, Vance, Circuit Judge, held, inter alia, that: (1) the indictment's mail fraud and interstate transportation counts were sufficient; (2) while defendants claimed that all 12 jurors may not have found proof of any particular fraudulent scheme and that some jurors may have found a single scheme while others found a multiple conspiracy, the elements of the two offenses did not fall into "two conceptual groupings" so that some jurors may have "thought the defendant committed only an act in the first conceptual grouping while others believed he committed an act only in the second"; (3) defendants' written waivers of objection to any conflict of interest from their joint representation extended to the first two, if not all three, of the alleged conflicts complained of on appeal, since those conflicts were evidenced during the arraignment discussion which preceded the waivers; and (4) proper jury instructions on intent were given.

Affirmed.

1. Post Office ⇐35(2)

Essential elements of an indictment for mail fraud are (1) a scheme to defraud (2) which involves a use of the mails (3) for the purpose of executing the scheme. 18 U.S.C.A. § 1341.

2. Post Office ⇐48(4¾, 8)

Indictment for mail fraud need not specifically charge, but the government must prove, "a specific intent to commit fraud," and that "the thing mailed was an integral part of execution of the scheme." 18 U.S.C.A. § 1341.

3. Post Office ⇐48(4)

Mail fraud counts of the indictment were sufficient where they alleged a scheme to defraud, use of the mails, and the purpose of executing the scheme. 18 U.S.C.A. § 1341.

4. Receiving Stolen Goods ⇐1

Essential elements of an indictment for interstate transportation of fraudulently taken checks, or similar property, are (1) interstate transportation of a stolen, converted, or fraudulently taken check of at least $5,000 value (2) with fraudulent intent. 18 U.S.C.A. § 2314.

5. Receiving Stolen Goods ⇐7(1)

Indictment's interstate transportation counts were sufficient, where they alleged interstate transportation of a fraudulently taken check for more than $5,000, and fraudulent intent in terms of "wilfully and knowingly caus[ing the check] to be transported in interstate commerce" and "knowing the same to have been taken by fraud." 18 U.S.C.A. § 2314.

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6. Criminal Law ⇐1032(5)

Indictment and Information ⇐119

Defendants' contention that the indictment lacked the specificity required by the Sixth Amendment was waived by their failure to object before trial; moreover, even if they could object for the first time on appeal, the Court of Appeals would reject their argument that the indictment's reference to particular events that "included, but were not limited to, the following" vitiated the indictment, though the district court should have treated that language as surplusage. Fed.Rules Cr.Proc. Rules 7(d), 12(f), 18 U.S.C.A.; U.S.C.A.Const. Amend. 6.

7. Indictment and Information ⇐121.-1(4)

Defendants' argument that "any of several acts conceivably underlay the Grand Jury's indictment" confused defendants' constitutional right to know what offense is charged with their need to know the evidentiary details establishing the facts of such offense that can be provided through a motion for bill of particulars.

8. Criminal Law ⇐872½

While defendants claimed that all 12 jurors may not have found proof of any particular fraudulent scheme and that some jurors may have found a single scheme while others found a multiple conspiracy, the elements of the two offenses in the instant case, mail fraud and interstate transportation of fraudulently taken property, did not fall into "two conceptual groupings" so that some jurors may have "thought the defendant committed only an act in the first conceptual grouping while others believed he committed an act only in the second." 18 U.S.C.A. §§ 2, 1341, 2314.

9. Indictment and Information ⇐171

Defendants' claim that the offense proved was not the offense charged was refuted by the fact that the indictment charged defendants with selling non-owned oil and gas leases and collecting workover amounts for them, a charge that was supported by proof at trial, and by the fact that the convictions were based on counts detailing implementation of that scheme. 18 U.S.C.A. §§ 2, 1341, 2314.

10. Criminal Law ⇐1167(1)

Defendants completely failed to demonstrate any prejudice arising out of the possible variance between the offenses proved at trial and those charged in the indictment.

11. Criminal Law ⇐1163(1), 1167(1)

Variance from the indictment is not always prejudicial, nor is prejudice assumed.

12. Indictment and Information ⇐198

Trial judge did not effectively amend the indictment by including instructions about conspiracy, since defendants themselves proposed instructions using the term "conspiracy" and clearly agreed to use of that term.

13. Witnesses ⇐198(1)

Admission of certain testimony by the former president of defendants' company was not shown to have been in violation of the attorney-client privilege; in his testimony before the jury, the witness revealed no confidential communication.

14. Witnesses ⇐198(1)

An attorney's involvement in, or recommendation of, a transaction does not place a "cloak of secrecy around all the incidents of such a transaction."

15. Criminal Law ⇐427(3)

Under the rule of *Apollo*, applicable to the instant 1978-tried case, testimony concerning declarations of coconspirators may be admitted before the existence of the conspiracy is established by independent evidence if the court's instruction "condition the minds of the jurors so that * * * none of this hearsay will bootstrap the necessary establishment of the conspiracy itself by firsthand proof."

16. Receiving Stolen Goods ⇐8(2)

In prosecution for mail fraud and interstate transportation of fraudulently taken property, involving sales to investors of nonowned oil and gas leases, the district judge did not commit plain error or any error at all in admitting evidence of a desist and refrain order issued by the California corporation's commissioner prohibiting defendants from selling leases without qualifying under state law. Fed.Rules Evid. Rule 103, 28 U.S.C.A.

17. Criminal Law ⇐451(1)

Testimony of two witnesses about their "impression" and "understanding" of defendants' relationship to each other and to the different companies in question, and testimony of a third witness as to whether, in his opinion, a consultant had actually run tests on an oil well, was properly admitted under the Federal Rule of Evidence which limits lay testimony to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue". Fed.Rules Evid. Rule 701, 28 U.S.C.A.

18. Criminal Law ⇐444

In prosecution for mail fraud and for the interstate transportation of fraudulently taken property, involving sales to investors of nonowned oil and gas leases, a letter prepared and sent to defendant by the attorney for an investor from information supplied to him by the investor was sufficiently authenticated by the investor's testimony, and it was properly admitted into evidence as showing the existence of investor complaints and as weakening the defense of ignorance and good faith. 18 U.S.C.A. §§ 2, 1341, 2314; Fed.Rules Evid. Rule 901, 28 U.S.C.A.

19. Criminal Law ⇐419(12)
Witnesses ⇐271(1)

In prosecution for mail fraud and interstate transportation of fraudulently taken property, involving sales to investors of nonowned oil and gas leases, a letter purportedly written by an investor, who did not testify, was properly used to cross-examine one defendant concerning his defense of good faith, and it was not hearsay since it was not offered to prove the truth of its contents. 18 U.S.C.A. §§ 2, 1341, 2314.

20. Criminal Law ⇐434, 1170(2)

While the district court, in mail fraud prosecution involving the sale to investors of nonowned oil and gas leases, erred in refusing to admit into evidence a book on oil property investments given to investors, the error was harmless beyond a reasonable doubt, since two defendants testified that they gave copies to each investor, and the essence of the desired evidence was therefore before the jury. Fed.Rules Evid. Rule 103(a), 28 U.S.C.A.

21. Post Office ⇐49(5)

Receiving Stolen Goods ⇐8(2)

Proffered testimony of defendant concerning his conversations with coindictee's father and an attorney regarding purchase of company was properly excluded as irrelevant to intent in prosecution for mail fraud and interstate transportation of fraudulently taken property, since the subject conversation occurred two years after the purchase of the company.

22. Post Office ⇐49(5)

Receiving Stolen Goods ⇐8(2)

In prosecution for mail fraud and interstate transportation of fraudulently taken property, involving the sale to investors of nonowned oil and gas leases, an alleged compromise agreement with some creditors was properly found to be irrelevant to defendants' intent, since it was entered into two years after the alleged fraud terminated. 18 U.S.C.A. §§ 2, 1341, 2314.

23. Criminal Law ⇐444, 1170(1)

In prosecution for mail fraud and interstate transportation of fraudulently taken property, involving the sale to investors of nonowned oil and gas leases, pages from the business diary kept by a coindictee and regularly sent to one of the defendants were sufficiently authenticated by that defendant and thus should have been admitted into evidence; however, the error was harmless beyond a reasonable doubt since the diary pages did not absolve any defendant from responsibility and knowledge regarding false production reports and completion letters, but merely inculpated the coindictee. Fed.Rules Evid. Rule 103(a), 28 U.S.C.A.

24. Criminal Law ⇐1137(1)

Defendants' written waivers of objection to any conflict of interest from their joint representation extended to the first two, if not all three, of the alleged conflicts complained of on appeal, since those conflicts were evidenced during the arraignment discussion which preceded the waivers.

25. Criminal Law ⇐641.5

Because not every conflict in joint representation will be so egregious as to constitute a violation of the Sixth Amendment, an actual, not merely hypothetical or speculative, conflict must be demonstrated for that Amendment to be abridged. U.S.C.A.Const. Amend. 6.

26. Criminal Law ⇐656(5)

Record failed to show that the trial judge improperly commented on the credibility of two witnesses; neither comment made by the judge reflected in any way on the credibility of those witnesses.

27. Criminal Law ⇐1171.1(3)

Prosecutrix' closing argument, "indictment does not specify investors beyond those eight [named] * * *. It is just sufficient to show you the scheme and not so many that the case might have taken even longer than it did," even if improper, was at most harmless error since the prejudicial effect, if any, of the argument was slight while the evidence of guilt was overwhelming.

28. Criminal Law ⇐422(1)

Defendants need not be charged with a substantive conspiracy count to justify use of one defendant's statements made in furtherance of the "scheme or artifice to defraud" against the other defendants.

29. Criminal Law ⇐422(1)

Coconspirator declarations may be attributed as evidence to other conspirators, once the existence of the conspiracy has been established under *Apollo* or *James*, regardless of whether the underlying offenses being proved include conspiracy.

30. Criminal Law ⇐1186.4(8)

Instruction on coconspirator declarations was not erroneous, and clearly was not plain error, since the charge was not "'so erroneous that when considered in the totality of the charge as a whole and the evidence presented against each appellant, the error is so great as to result in the likelihood of a great miscarriage of justice.'" Fed.Rules Cr.Proc. Rule 30, 18 U.S.C.A.

31. Criminal Law ⇐778(6)

Trial court's charge, "* * * it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his or her knowing acts," did not require the jurors to draw the inference of fraudulent intent.

Appeal from the United States District Court for the Western District of Texas.

Before VANCE, POLITZ and RANDALL, Circuit Judges.

VANCE, Circuit Judge:

Richard Daniel Freeman, Robert Temp, and Alaine Carter Temp appeal their convictions in a jury trial for mail fraud, 18 U.S.C. §§ 1341 and 2, for interstate transportation of fraudulently taken property, *id.* §§ 2314 and 2. They raise numerous challenges to the indictment, evidentiary rulings, the jury instructions, other trial events, and the cumulative effect of these alleged errors. We affirm.

I. THE FRAUDULENT SCHEME

Freeman and Mr. Temp entered an agreement in 1970 with Walter Wilson Carter, Jr., who also was indicted, but testified for the government. Freeman and Temp would locate and deal with California investors, primarily physicians and other professional persons, through Temp's business, Diversified Monetary Systems, Inc. (DMS). Carter would obtain and operate the oil and gas properties through his partially owned corporation, Independence Drilling Corp. (IDC). DMS induced the investors to enter purchase acquisition contracts with IDC for oil property leases, workover contracts, and remedial work on the wells. DMS, itself, entered financial management contracts with the investors for a substantial annual fee. DMS sent the purchase amounts and workover charges to Carter, who acquired the leases and arranged for necessary remedial work.

Because Carter's operations lost money, Temp and Freeman formed Continental Pacific Corp. (CPC) in 1972, with Temp as president. CPC took over all production operations and investor records by contract with IDC. Mrs. Temp[1] established and ran the CPC office in Texas; she approved all correspondence, read all incoming mail, and reviewed the accounting books. Mr. Temp moved from California to Texas in 1973 to over-

1. Alaine Carter Temp actually was Alaine Carter until 1976, when she married Mr. Temp, but is referred to for uniformity's sake as Mrs. Temp.

see the field work with Carter and to take part in running CPC and IDC.

IDC owned around 100 leases on oil and gas property at a time. The appealed convictions arise from the sale to investors of seven leases that Carter, IDC, and CPC never owned, although Carter had negotiated to buy them. Between July 1971 and December 1974 Freeman and, in a few cases, Mr. Temp sold those seven leases for a total of $767,447.99 to about forty-five investors. Mrs. Temp knew of these sales and prepared the paperwork accompanying the leases sent to the investors. In connection with the nonowned leases appellants also charged investors workover fees of $814,610.00 purportedly to maximize the petroleum production, and sent completion letters to the investors even though appellants did not expend that money on those particular properties. Mrs. Temp directed preparation of the completion letters. In fact, IDC and CPC commingled all the investors' funds in the general operating fund and apparently arbitrarily fixed net production returns to approximate the investors' payments on loans incurred in buying the leases. Appellants sent the investors production reports on the seven nonowned wells, although some did not produce oil or gas and none of the product accrued to the investors' benefit.

The superseding indictment charged Freeman, Mr. Temp, Mrs. Temp, and Carter with sixteen counts of mail fraud and twelve counts of interstate transportation of fraudulently taken property. After a five-week trial, the jury convicted all three appellants of eight counts of mail fraud and seven counts of interstate transportation; it also convicted Mr. Temp and Mrs. Temp of one other count of mail fraud and one of interstate transportation. The mail fraud convictions were based on transmission through the mail of production memoranda and another document about the nonowned properties from IDC to four investors in 1974 and 1975. The interstate transportation convictions were based on transfer of checks for interests in the nonowned properties from four investors to IDC in 1973 and 1974.[2]

II. THE INDICTMENT

Appellants argue that the indictment did not charge an offense and that it lacked the necessary specificity. They did not raise these objections in the court below. Their contention that the indictment did not charge an offense may still be raised, Fed.R.Crim.P. 12(b)(2), but it is without merit. The indictment charged that appellants made false, fraudulent, and misleading statements that IDC owned or operated several nonowned leases and would spend the workover charges on those specific lease interests to produce income for the investors, and it alleged that appellants sold those nonowned leases to the investors and failed to apply the workover charges to those properties. The indictment also listed particular mailings to those investors and check transfers across state lines from those investors. In assessing the sufficiency of the indictment, we reprint appellants' own summary of the first count of the indictment in the margin[3] and refer to it in the remainder of this section.

[1–3] The essential elements of an indictment for mail fraud, 18 U.S.C. § 1341, are "(1) a scheme to defraud (2)

2. One interstate transportation count involved oil property that was owned. Freeman was not convicted on that count.

3. The first count of the indictment contains the underlying facts for each alleged instance of

which involves a use of the mails (3) for the purpose of executing the scheme." *United States v. Kent*, 608 F.2d 542, 545 (5th Cir. 1979). *See United States v. Maze*, 414 U.S. 395, 399, 94 S.Ct. 645, 647, 38 L.Ed.2d 603 (1974). The indictment need not specifically charge, but the government must prove, "a specific intent to commit fraud," *United States v. Kent*, 608 F.2d at 545 n. 3, and that "the thing mailed was an integral part of execution of the scheme," *id.* at 546. The present indictment in count one clearly alleged a scheme to defraud in paragraphs 1 and 3; use of the mails in paragraph 2(*o*) and in each mail fraud count; the purpose of executing the scheme in each mail fraud count.[4] The

mail fraud and interstate transportation of fraudulently taken property. It is incorporated by reference in the other 27 counts each of which lists a specific alleged offense. The following is appellants' summary of count one:

¶1 – Defendants devised [and intended to devise] a scheme to defraud by false pretenses, representations, and promises. Investors would be induced to pay for "turnkey drilling" or "workover" contracts and for alleged working interests in oil/gas leases.

¶2 – Part of the scheme [was:]

(a) 6/23/70 – [Mr.] Temp and Freeman incorporate DMS [to sell investment interests in oil and gas leases].

(b) 8/26/70 – Carter incorporates IDC [to engage in oil and gas production].

(c) 7/70 – Temp/Freeman/Carter begin offering the leases, and

(d) [investors executed] the management agreement, and

(e) investors executed lease purchase contracts and workover contracts,

(f) usually paying with bank loans.

(g) 8/26/70–10/31/72 – IDC operated the leases purportedly producing or trying to produce petroleum[.]

(h) 10/27/72 – Temp forms CPC[.]

11/1/72 – CPC takes over production and workover operations from IDC[.]

(i) 2/73–date – Temp personally directs all CPC and IDC operations[.]

(j) 2/24/73 – Mrs. Temp becomes a Director and officer of CPC and begins shared management responsibilities with [Mr.] Temp.

12/17/73 – Mr. Temp is [serving as] Director/Officer of DMS[.]

(k) 12/17/73 – DMS buys Ardmore Partners, Inc.

(l) 1/15/74 – Freeman buys ECC, a wholly owned subsidiary of DMS, from DMS[.]

(m) 12/31/74 – Ardmore changes its name to ECC[.]

(n) 7/30/74 – Temp becomes principal shareholder of IDC[.]

(o) [unspecified] – IDC/CPC/Defendants have
[1] caused correspondence and documentation [regarding] the investment contracts [and]
[2] false/misleading production reports to be sent in the mail to lull and cause prior and prospective investors to invest and reinvest[.]

(p) 1970–date – [Defendants caused] investor monies [to be:]
1 used to make purported production payments,
2 com[m]ingled and used for general operating expenses [of IDC, CPC, and DMS, and]
3 diverted to [other] corporate and personal uses.

¶3 – Part of the scheme [to defraud was] making false/misleading statements, representations, promises [knowing at the time that said statements, representations, and promises were false, fraudulent, and misleading when made,] *including but not limited to*

(a) IDC owned/operated the seven unowned leases

(b) workover monies would be spent on those seven leases

(c) workover contracts would result in increased production and provide specified amounts of income[.]

[¶4 – One instance of interstate transportation of fraudulently taken property.]

4. A typical mail fraud count is count two, which realleges the allegations of count one, and charges that

mail fraud counts of the indictment are therefore sufficient.

[4, 5] The essential elements of an indictment for interstate transportation of fraudulently taken checks (or similar property), 18 U.S.C. § 2314 (paragraphs 1 and 2), are (1) interstate transportation of a stolen, converted, or fraudulently taken check of at least $5,000 value (2) with fraudulent intent. *See United States v. Driscoll*, 454 F.2d 792, 797 (5th Cir. 1972). The present indictment in each interstate transportation count alleged (1) interstate transportation of a fraudulently taken check for more than $5,000 and (2) fraudulent intent in terms of "wilfully and knowingly caus[ing the check] to be transported in interstate commerce" and "knowing the same to have been taken by fraud."[5] The interstate transportation counts of the indictment are therefore sufficient. The aiding and abetting allegations, 18 U.S.C. § 2, within those same counts are similarly sufficient.

[6, 7] Appellants' contention that the indictment lacked the specificity required by the sixth amendment was waived by their failure to object before trial. *United States v. Varner*, 437 F.2d 1195, 1197 (5th Cir.), *cert. denied*, 404 U.S. 825, 92 S.Ct. 52, 30 L.Ed.2d 52 (1971) (mail fraud); Fed.R.Crim.P. 12(f). Even if they could object for the first time at this late date, we would reject their argument that the indictment's reference to particular events that "included, but were not limited to, the following" vitiated the indictment, *United States v. Caine*, 441 F.2d 454, 456–57 (2d Cir.), *cert. denied*, 404 U.S. 827, 92 S.Ct. 59, 30 L.Ed.2d 55 (1971) ("among others"), although the district court should have treated that language as surplusage, *Marsh v. United States*, 344 F.2d 317,

On or about May 21, 1973, in the Western District of Texas, Defendants

WALTER WILSON CARTER, JR.
ROBERT TEMP
RICHARD DANIEL FREEMAN
and
ALAINE CARTER TEMP

aided and abetted by each other for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain money by means of false and fraudulent pretenses, representations, and promises, and attempting to do so, wilfully and knowingly caused to be placed in an authorized depository for mail matter, an envelope addressed to Mr. Phil Milano, 939 Detroit Avenue, Concord, California 94520, which envelope contained a seven-page oil and gas lease production report issued by Independence Drilling Corporation for the month of March, said envelope and contents to be sent and delivered by the United States Postal Service, in violation of Title 18, United States Code, Sections 2 and 1341.

5. A typical interstate transportation count is count one, which charges that

On or about December 10, 1973, in the Western District of Texas, Defendants
WALTER WILSON CARTER, JR.,
ROBERT TEMP,
RICHARD DANIEL FREEMAN,
AND
ALAINE CARTER TEMP
aided and abetted by each other for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations, and promises, and attempting to do so, wilfully and knowingly caused to be transported in interstate commerce from the State of California to San Antonio, Texas, a check dated December 5, 1973, drawn on the account of Carl A. Ball, Jr., at the Security Pacific National Bank, made payable to Independence Drilling Corp., in the amount of $36,000, knowing the same to have been taken by fraud, in violation of Title 18, United States Code, Sections 2 and 2314.

322 (5th Cir. 1965) ("the following and other offenses"); *see* Fed.R.Crim.P., 7(d). We also disagree with appellants' argument that "any of several acts conceivably underlay the Grand Jury's indictment," because that argument "confuses the Defendants' constitutional right to know what offense is charged with his need to know the evidentiary details establishing the facts of such offense" that can be provided through a motion for bill of particulars. *Van Liew v. United States*, 321 F.2d 664, 670 (5th Cir. 1963) (emphasis omitted).

[8] Appellants also charge that all twelve jurors may not have found proof of any particular fraudulent scheme, *see United States v. Gipson*, 553 F.2d 453, 457–58 (5th Cir. 1977), but that some jurors might have found a single scheme while other jurors found a multiple conspiracy, *see United States v. Nettles*, 570 F.2d 547, 551–52 (5th Cir. 1978). Appellants did not raise their objection at trial, but contend that the court's failure to give jury instructions requiring unanimous agreement on one scheme was plain error. *See United States v. Cook*, 586 F.2d 572, 579 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2821, 61 L.Ed.2d 274 (1979); Fed.R.Crim.P. 30, 52(b). The instructions, however, required both that a guilty verdict be unanimous and that all essential elements be present "with respect to a particular count" of mail fraud or "with regard to a particular count" of interstate transportation of fraudulently taken property. Unlike the elements of 18 U.S.C. § 2313 in *Gipson*, the elements of each offense in this case do not fall into "two conceptual groupings" so that some jurors may have "thought the defendant committed only an act in the first conceptual grouping while others believed he committed an act only in the second." 553 F.2d at 458. The hearsay instructions that referred to a "conspiracy or scheme," which we discuss below, uniformly contemplated only a single combination.

[9–12] Freeman, Mr. Temp, and Mrs. Temp also argue that "this court cannot say that the offense proved was the offense charged," and that the trial court "amended the indictment and permitted conviction of conspiracy that was not charged." The argument fails, however, because the indictment charged appellants with selling nonowned leases and collecting workover amounts for them, a charge that was supported by proof at trial, and the convictions were based on counts detailing the implementation of that scheme. Also, as in *United States v. Baldarrama*, 566 F.2d 560 (5th Cir.), *cert. denied*, 439 U.S. 844, 99 S.Ct. 140, 58 L.Ed.2d 145 (1978), "defendants completely failed to demonstrate any prejudice arising out of a possible variance between the offenses proved at trial and those charged in the indictment. Variance from the indictment is not always prejudicial, nor is prejudice assumed." *Id.* at 566. The trial judge did not effectively amend the indictment by including instructions about conspiracy, because, as discussed in Part V *infra*, appellants themselves proposed instructions using the term conspiracy and clearly agreed to use of that term.

III. EVIDENTIARY RULINGS

[13, 14] Appellants argue that admission of certain testimony of Cliff Miller, the former president of CPC, violated the attorney-client privilege. *See* Fed.R. Evid. 501. Citing pages 1801–1810 of the transcript, appellants assert that Miller testified that Stephen Nye, the attor-

ney for Mr. Temp, CPC, DMC, and IDC instructed him during January 1974, when he was president of CPC, to hide some of IDC's corporate records in a warehouse before the SEC enforced a subpoena in its investigation of CPC and IDC. The transcript reveals, however, that the jury had retired from the courtroom and that the testimony specifically cited by appellants was not given in the jury's presence. After the jury returned to the courtroom, Miller affirmed that he had met with Carter, Mr. Temp, and Nye in January 1974 and testified generally that an upcoming Securities and Exchange Commission investigation had been discussed. He named Mr. Temp as the person who had given him his orders. When asked whether Mr. Temp had given him any instructions as to any corporate records, he replied,

> Yes, we went to Independence Drilling Corporation and removed two boxes of tax records from I.D.C. and removed them, Bob Temp and I removed them to an office, I mean a garage, rather, about four or five or six blocks from the office that we had for a motorcycle shop.

In his testimony before the jury, Miller revealed no confidential communications. Miller's statement that he and Mr. Temp moved boxes of corporate records is the revelation of an act in which he participated, not of a confidential disclosure. "An attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all the incidents of such a transaction." *In re Fischel*, 557 F.2d 209, 212 (9th Cir. 1977). *See generally, United States v. Pipkins*, 528 F.2d 559, 562–63 (5th Cir.), *cert. denied*, 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1191 (1976). We find no error in the admission of Miller's testimony.

Appellants also challenge the district judge's rulings in admitting coconspirator declarations, testimony about securities law violations, impressions of witnesses, and letters from investors. They disagree with exclusion of some intent evidence and some diary pages.

[15] Freeman, Mr. Temp, and Mrs. Temp argue that the court improperly admitted hearsay statements of each appellate against the others before their membership in a conspiracy was established by independent evidence. This circuit's decision in *United States v. James*, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), did not govern the instant trial, because *James* applies only to conspiratorial statements offered in trials commencing after March 14, 1979, *id.* at 583, and this case was tried in 1978. Instead, our earlier decision in *United States v. Apollo*, 476 F.2d 156 (5th Cir. 1973), governed this case. The district court properly applied *Apollo's* rule that "[t]estimony concerning the declarations of co-conspirators may be admitted before the existence of the conspiracy is established by independent evidence" if the court's instructions "condition the minds of the jurors so that . . none of this hearsay will bootstrap the necessary establishment of the conspiracy itself by firsthand proof." *Id.* at 163 (emphasis omitted). *See also* Part V *infra*.

[16] Appellants contend that the trial court should not have admitted their former attorney's testimony about a desist and refrain order from the California corporations commissioner prohibiting them from selling leases without qualifying under state law and about the attorney's correspondence with the California

commissioner. The attorney sought to show appellants' good faith in selling leases by testifying that they qualified the investment packages under the California securities law. The prosecution attempted on cross-examination to controvert their good faith by showing that appellants actually consulted that attorney only after they received a desist and refrain order from the California commissioner against their sales of unqualified securities. *See* Fed.R.Evid. 404(b). Appellants objected to use of the California order and correspondence to lead into testimony about an Oklahoma action brought by the Securities and Exchange Commission and a consent decree that ensued. *See United States v. Cook*, 557 F.2d 1149 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020, 98 S.Ct. 744, 54 L.Ed.2d 767 (1978) (as direct evidence). They withdrew any further objection after the prosecution did not discuss the SEC action and the trial judge ruled the consent decree inadmissible. Appellants cannot now raise their objection, because the district judge did not commit plan error or any error at all in admitting evidence of the desist and refrain order. *See United States v. Cook*, 586 F.2d at 579; Fed.R.Evid. 103.

[17] Freeman, Mr. Temp, and Mrs. Temp contend that admission of the testimony of three former employees of CPC and IDC violated the restriction on opinion evidence. Two witnesses testified about their "impression" and "understanding" of appellants' relationship to each other and to the different companies, and the third gave his opinion about whether a consultant actually had run tests on an oil well. Federal Rule of Evidence 701 limits lay testimony to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Fed.R. Evid. 701. The challenged testimony falls within that exception, and the district judge did not abuse his discretion in admitting it. *See, e. g. United States v. Mandujano*, 499 F.2d 370, 379 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975) (witness' "understanding").

[18, 19] Appellants suggest that three letters written by investors or their attorneys were hearsay, unauthenticated, or irrelevant. The first letter was prepared and sent to Carter by the attorney of a DMS investor, Dr. Maurice Fox, from information supplied to him by Fox after meeting with Carter and Mr. Temp. It was sufficiently authenticated by Fox's testimony. *See* Fed.R.Evid. 901. It was properly admitted as showing the existence of investor complaints and, because Mrs. Temp screened Carter's mail, as weakening appellants' defense of ignorance and good faith. The second letter was sent from Fox to Carter in January 1976. It was relevant because it was written in response to a completion letter of October 1975 that fell within the scope of the indictment. The final letter was purportedly written by an investor, who did not testify, in response to an IDC letter, and was used to cross-examine Mr. Temp concerning his defense of good faith. *See generally, e. g., United States v. Bibbs*, 564 F.2d 1165, 1168–69 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007, 98 S.Ct. 1877, 56 L.Ed.2d 388 (1978). It was not hearsay because it was not offered to prove the truth of its contents.

[20–22] Appellants challenge exclusion of their proffered evidence of intent. (1) They sought to introduce a

book on oil property investments given to investors. The court excluded the book as irrelevant when the investor who testified that he was given the book also stated that he had told Freeman that he would not have time to read it. The court erred in refusing to admit the book because presenting copies to investors was relevant to good faith, but the error was harmless beyond a reasonable doubt. *See* Fed.R.Evid. 103(a). Freeman and Mr. Temp both testified that they gave copies to each investor, so the "essence of desired evidence [was] before the jury," and "any harm in the original exclusion was eliminated." *See United States v. Sanfilippo*, 581 F.2d 1152, 1155 (5th Cir. 1978). (2) Appellants offered Mr. Temp's testimony about his conversation with Carter's father and an attorney regarding the purchase of IDC. The trial judge properly excluded this testimony as irrelevant to intent because the 1976 conversation occurred two years after the purchase. (3) Appellants attempted to introduce a compromise agreement with some creditors after presenting the supporting testimony of the creditors' trustee. The court below properly found the agreement irrelevant to appellants' intent because it was entered two years after the alleged fraud terminated. *See United States v. Powers*, 467 F.2d 1089, 1096 (7th Cir. 1972), *cert. denied*, 410 U.S. 983, 93 S.Ct. 1499, 36 L.Ed.2d 178 (1973).

[23] They also object to exclusion of pages from the business diary kept by Carter and regularly sent to Mrs. Temp. The district court concluded that the diary pages were unauthenticated because appellants refused to call Carter for that purpose even though he was available. The diary pages, however, were sufficiently authenticated by Mrs. Temp. *See United States v. White*, 444 F.2d 1274, 1280 (5th Cir.), *cert. denied*, 404 U.S. 949, 92 S.Ct. 300, 30 L.Ed.2d 266 (1971); Fed.R.Evid. 901(a), 901(b)(1) & (2). They were relevant to her testimony of Carter's activity in preparing production reports and completion letters. The exclusion of the diary pages was error harmless beyond a reasonable doubt, however, because they did not absolve Mrs. Temp or the other appellants from responsibility and knowledge regarding the production reports and completion letters, but merely inculpated Carter. *See* Fed.R.Evid. 103(a).

IV. TRIAL EVENTS

[24, 25] Appellants contend that the district court failed to recognize a conflict of interest that denied them the effective assistance of counsel. The district judge inquired extensively during their arraignment into possible conflicts of interest from joint representation, and appellants knowingly and intelligently executed written waivers of objection to any conflict. *See United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975). Appellants allege that conflicts arose subsequently because Carter's testimony might have hurt one appellant more than others, one appellant might have impeached the others, and the extrajudicial statements of one appellant might have been used against the others. Appellants' waiver extended to the first two, if not all three, of these alleged conflicts because they were evident during the arraignment discussion. *See Gray v. Estelle*, 574 F.2d 209, 213–14 (5th Cir. 1978). The third alleged conflict, as well as the others, was only speculative. Because "not every conflict in representation will be so egregious as to constitute a violation of the Sixth Amendment," "an actual, not merely hypotheti-

cal or speculative conflict must be demonstrated" for that amendment to be abridged. *United States v. Alvarez*, 580 F.2d 1251, 1255 (5th Cir. 1978). Because the conflict was speculative rather than actual, "the Court does not bear the responsibility of informing co-defendants of possible problems of joint representation." *United States v. Boudreaux*, 502 F.2d 557, 558 (5th Cir. 1974). We note that appellants have again chosen joint representation on appeal.

[26] Appellants argue that the trial judge improperly commented on the credibility of two witnesses. After appellants' counsel had asked Carter numerous questions about commingling of funds that Carter had admitted, the judge said, "I think he is clear, counsel. There's no use in pushing that further. He has made it clear." When another witness used a chart for complex figures, the judge said that the chart was not evidence, "but just . . . a summary of the explanations that the witness gave you as best he could compile those figures based upon the documents that have been introduced into evidence." Neither comment reflected in any way on the credibility of those witnesses.

[27] Appellants suggest that the government's closing argument placed before the jury damaging facts that were not in evidence, were never established in the trial, and prejudicially bore on intent. *See Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 284 (5th Cir. 1975). The prosecutrix said, "You have heard Janklow's name mentioned and other investors. The indictment does not specify investors beyond those eight [named]. . . . It is just sufficient to show you the scheme and not so many that the case might have taken even longer than it did." Appellants failed to object, and we therefore must affirm in the absence of plain error. *See United States v. Cook*, 586 F.2d at 579; Fed.R. Evid. 103. Even if it was not wholly cumulative of trial testimony about other investors in the seven nonowned properties, the comment was at most harmless error because the "prejudicial effect, if any, of the alleged improper argument here appears to be slight, while the evidence of guilt is overwhelming." *United States v. Rodriquez*, 503 F.2d 1370, 1371 (5th Cir. 1974).

V. JURY INSTRUCTIONS

[28–30] Appellants argue that the jury instructions referring to "conspiracy" were erroneous. They proposed a charge on coconspirator declarations, and used the word "conspiracy" throughout. The district judge discussed the requested instruction at a bench conference and said, "I want to alert both counsel, you both used the word conspiracy in your requested charges. You both used that term interchangeably, this scheme as used in the statute, and if so, that's agreeable with the Court." The judge then added the phrase "or scheme" after each reference to conspiracy and gave copies of his *Apollo* instructions to both counsel. The final instructions were as follows:

> With respect to the conspiracy or scheme as alleged in the indictment you should first determine, from all of the testimony and evidence in the case, whether or not the conspiracy or scheme existed as charged. If you conclude that a conspiracy or scheme did exist as alleged, you should next determine whether the particular defendant under consideration willfully became a member of such conspiracy or scheme.

> In determining whether a defendant was a member of an alleged conspiracy or scheme, however, the jury should consider only that evidence, if any, pertaining to his own acts and statements. . . .
>
> On the other hand, if and when it does appear, if it should so appear, beyond a reasonable doubt from the evidence in the case that a conspiracy or scheme did exist as charged, and that the defendant under consideration was one of its members, then the statements and acts knowingly made and done, during the conspiracy or scheme and in furtherance of its objects, by any other proven member of the conspiracy or scheme, may be considered as evidence against the defendant under consideration even though he or she was not present to hear the statements made or see the acts done.

Appellants objected at the bench conference to some testimony offered to establish a prima facie case of conspiracy, and requested a "running objection to all of this matter," but the district court denied that request. They failed to object further at the conference and said that they had no objection to the jury instructions; therefore, we will not reverse on that issue in the absence of plain error. *See* Fed.R.Crim.P. 30. Defendants need not be charged with a substantive conspiracy count to justify use of one defendant's statements made in furtherance of the "scheme or artifice to defraud" against the other defendants. Coconspirator declarations may be attributed as evidence to other conspirators, once the existence of the conspiracy has been established under *Apollo* or *James*, regardless of whether the underlying offenses being proved include conspiracy. *See United States v. Amrep Corp.*, 560 F.2d 539, 545 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015, 98 S.Ct. 731, 54 L.Ed.2d 759 (1978) (mail fraud). *See also Weiss v. United States*, 120 F.2d 472, 475 (5th Cir.) *cert. denied*, 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550 (1941); *United States v. Knippenberg*, 502 F.2d 1056, 1061 (7th Cir. 1974) (mail fraud and interstate transportation of fraudulently taken property). The instruction on coconspirator declarations was not erroneous, and it clearly was not plain error because the charge is not " 'so erroneous that when considered in the totality of the charge as a whole and the evidence presented against each appellant, the error is so great as to result in the likelihood of a grave miscarriage of justice.' " *United States v. Franklin*, 586 F.2d 560, 569 (5th Cir. 1978), *cert. denied*, 440 U.S. 972, 99 S.Ct. 1536, 59 L.Ed.2d 789 (1979) (quoting *United States v. Smith*, 502 F.2d 1250, 1256 (5th Cir. 1974)).[6]

[31] Freeman, Mr. Temp, and Mrs. Temp also contend that the jury instructions on intent were erroneous. In his instructions the court stated in relevant part,

> Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. However, *it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his or her knowing acts.* The jury may draw the inference that a defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result in any intentional act or conscious omission.

6. We do not consider whether appellants affirmatively waived any objection to the instruction by proposing a substantially similar charge.

(Emphasis added.) Appellants argue that a reasonable juror would have understood the italicized language as requiring the juror to draw the inference of intent, at least unless appellants proved the contrary. They did not object, and can only obtain reversal on appeal based on the jury instruction if it contained plain error, Fed.R.Crim.P. 30, when reviewed as a whole rather than in single isolated sentences, *United States v. Roberts*, 546 F.2d 596, 598 (5th Cir.), *cert. denied*, 431 U.S. 968, 97 S.Ct. 2927, 53 L.Ed.2d 1064 (1977). The quoted instruction is nearly identical to the language suggested in *United States v. Wilkinson*, 460 F.2d 725, 733 (5th Cir. 1972) (mail fraud), and approved in *United States v. Chiantese*, 560 F.2d 1244, 1255–56 (5th Cir. 1977) (en banc) (plurality opinion), *cert. denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979). It does not contain the language shifting the burden of proof that was disapproved in *Mann v. United States*, 319 F.2d 404, 409 (5th Cir. 1963), *cert. denied*, 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964), and recently in *Sandstrom v. Montana*, 442 U.S. 510, 525–26, 99 S.Ct. 2450, 2460, 61 L.Ed.2d 39 (1979) (instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," *id.* at 513, 99 S.Ct. at 2451). The very next sentence in this court's charge clarifies that the jury "may" draw the inference of intent. The instruction was within the trial judge's discretion, and was neither error nor plain error.

VI. CUMULATIVE EFFECT

Appellants assert that the cumulative effect of the errors discussed and other aspects of the trial denied them a fair trial. *See, e. g., United States v. Labarbera*, 581 F.2d 107, 110 (5th Cir. 1978). We conclude that they received a full and fair trial.

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Appendix 2

United States Court of Appeals
For the Fifth Circuit

October Term, 19

No. 79-5044

D. C. Docket No. SA-78-CR-015

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD DANIEL FREEMAN, ROBERT TEMP
AND ALAINE CARTER TEMP,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

Before VANCE, POLITZ and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby, affirmed.

June 25, 1980

Issued as Mandate:

Appendix 3

U.S. Court of Appeals
Filed
Aug 13 1980
Gilbert F. Ganucheau
Clerk
U.S. Court of Appeals
Received
Aug 15 1980
New Orleans, LA

In the United States Court of Appeals
For the Fifth Circuit

No. 79-5044

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD DANIEL FREEMAN,
ROBERT TEMP & ALAINE CARTER TEMP,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

---

ON PETITION FOR REHEARING
(August 13, 1980)

Before VANCE, POLITZ and RANDALL, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

ROBERT S. VANCE
United States Circuit Judge

Appendix 4

U.S. Court of Appeals
Filed
Sep 2 1980
Gilbert F. Ganucheau
Clerk

In the United States Court of Appeals
For the Fifth Circuit

No. 79-5044

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD DANIEL FREEMAN, ROBERT TEMP and
ALAINE CARTER TEMP,
Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas

ORDER:

( ) The motion of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 17, as amended January 22, 1979.

(x) The motion of APPELLANTS for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including OCTOBER 12, 1980 the stay to continue in force until the final disposition of the case by the Supreme

Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of ..... for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of .... for a further stay of the issuance of the mandate is DENIED.

ROBERT S. VANCE

United States Circuit Judge

Appendix 5

Filed
Jan 16 1978
Dan W. Benedict, Clerk
By JCD, *Deputy,*

ATTORNEY'S STATEMENT AS TO CONFLICTS OF INTEREST

I, Anthony Nicholas, a member of the State Bar of Texas, and admitted to practice in Federal Court for the Western District(s) of Texas, appear to represent jointly the following defendants:

1. Robert Temp
2. Richard Daniel Freeman
3. Alaine Carter Temp

I have thoroughly investigated the facts of this case and am aware of the facts as they will affect each of the defendants I represent. I have also considered what possible theories the United States may advance in the prosecution of the case, the witnesses it may call, and the trial strategy I will follow.

Moreover, the above factors have been considered in light of *United States v. Garcia,* 517 F.2d 272 5th Cir. 1975), *United States v. Mahar,* 550 F.2d 1005 (5th Cir. 1977), and the ethical considerations presented by the Texas Disciplinary Rules, including but not limited to DR5-105, the Canons of Professional Ethics, and the American Bar Association's Standards Relating to Defense Function, including but not limited to § 3.5 and the commentary thereto.

I represent to the Court that, having given full consideration to the foregoing, I am certain that there is no conflict

in interest between the defendants I represent. I am certain as well that no conflict of interest will arise should one or more defendants decide to enter a plea agreement. Furthermore, I foresee no conflicts in any sentencing presentations I might make to the court in the event that one or more of the defendants is found guilty.

I recognize that, should later events disclose that my assessment of the matter of conflict-in-interest was in error, I may be subject to court-imposed or other sanctions as may be deemed appropriate under the circumstances.

I further state to the court that I have conferred with each of my clients, discussed with them the facts of the case, their own status alone and as it may be affected by the status of the others I represent, and the trial strategy I plan to pursue, including the witnesses I plan to call. I have also advised them of any potential conflicts of interest that might occur and of their right to separate counsel; however, I have advised them that I presently perceive no conflict in the interest of any one defendant as against any other defendant jointly represented by me.

ANTHONY NICHOLAS
Attorney for the Defendants

Dated: Jan. 16, 1978

ROBERT TEMP
ALAINE C. TEMP
RICHARD FREEMAN

No. 80-610

In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD DANIEL FREEMAN, ROBERT TEMP, AND ALAINE CARTER TEMP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-610

RICHARD DANIEL FREEMAN, ROBERT TEMP, AND ALAINE CARTER TEMP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the district court's failure to inquire into an alleged conflict of interest deprived petitioners of effective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 619 F. 2d 1112.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1980. A petition for rehearing was denied on August 13, 1980. The petition for a writ of certiorari was filed on October 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of using the mail in the execution of a scheme to defraud, in violation of 18 U.S.C. 1341, and of interstate transportation of property taken by fraud, in violation of 18 U.S.C. 2314.

Petitioners Freeman and Robert Temp were sentenced to terms of eight years' imprisonment and petitioner Alaine Temp was sentenced to a term of six years' imprisonment.

1. The evidence at trial revealed that petitioners and one Walter Wilson Carter[1] devised a scheme to defraud investors by selling oil leases that neither petitioners nor Carter owned. Carter obtained and operated oil and gas properties through his partially owned corporation, Independence Drilling Corp. (IDC). Petitioners, in turn, located investors through their businesses, Diversified Monetary Systems, Inc. (DMS) and Continental Pacific Corp. (CPC). The convictions arose from the sale to 45 investors of seven leases that Carter, IDC, and CPC never owned. In connection with these leases, petitioners also charged investors workover fees, purportedly to maximize the petroleum production, although petitioners never expended money on

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[1]Carter was indicted together with petitioners, but he pleaded guilty and testified for the government.

the properties. Petitioners also sent investors production reports on the nonowned wells, although some of the wells did not produce any oil or gas and none of the product of any of the wells accrued to the investors' benefit (Pet. App. 5-6). Petitioners presented a unified defense that they were unaware that Carter did not own the leases (Pet. 2).

2. At arraignment, petitioners were represented by a single attorney, and Carter was represented by a second attorney. In view of petitioners' joint representation, the district court inquired (XXVI Tr. 7-8) whether petitioners had reviewed and signed a waiver of conflict of interest in conformity with the Fifth Circuit's decision in *United States* v. *Garcia*, 517 F. 2d 272 (1975). The judge explained to petitioners' attorney that he " * * * just wanted to be sure now that your clients [know where they stand] so they won't be complaining about you in the event they are convicted and come in on horseback on a 2255 and say 'I should never have had one lawyer represent all three of us because he is guilty.' The other one says 'No.' The other one says, 'No, he is guilty' " (XXVI Tr. 4-5). After each petitioner averred that he had read and signed the statement, the court inquired: "Do you understand that [the statement] is for each of your protection * * * that you can't later come in and claim that he should not have tried to represent all three of you because of a conflict of interest between you that you should have each had separate lawyers because you had separate defenses? * * * And are you satisfied that even if there is a conflict of interest between your possible defenses in this case, that you nevertheless insist and ask this Court to let you be represented by the attorney of your choice, Mr. Nicholas?" (XXVI Tr. 7-8). Petitioners replied that they understood the statement and agreed to the waiver.

ARGUMENT

Petitioners contend that, even though the district court inquired into the propriety of multiple representation at arraignment, it was required to do so again after their

co-defendant, Carter, pleaded guilty and agreed to testify for the government. Petitioners contend that the guilty plea raised a potential and actual conflict of interest that was not recognized by the court at arraignment and that their waiver therefore should not be deemed to have survived Carter's change in position. Petitioners' contention is without merit.

Joint representation is not *per se* a violation of the constitutional guarantee of assistance of counsel. *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978). Where no party objects to joint representation, the Sixth Amendment does not require the trial court to initiate inquiry regarding multiple representation in every case. "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Cuyler* v. *Sullivan*, No. 78-1832 (May 12, 1980), slip op. 11 (footnote omitted).

In the present case, petitioners did not object to their continued representation by a single attorney after Carter pleaded guilty and agreed to testify for the government. Nor, as the court of appeals correctly held (Pet. App. 12-13), was there anything in the circumstances of this case to indicate to the trial court that a "particular conflict exist[ed]" (*Cuyler* v. *Sullivan*, *supra*, slip op. 11) as a result of Carter's change in position such that the trial court had a duty to reinquire of petitioners respecting a possible conflict of interest. The court previously had inquired into the propriety of joint representation, and petitioners waived objections based on potential conflicts of interest after the possibility that petitioners might have inconsistent defenses was discussed. In any event, at trial, petitioners presented a unified defense that they were unaware that Carter did not own the leases; the fact that Carter testified did not change this defense or give rise to conflicting interests.

Petitioners argue (Pet. 3-4) that a conflict of interest developed because Carter's decision to testify resulted in their attorney's decision to have them testify in response. Petitioners suggest that they were deprived of the advice of independent counsel in determining whether, in fact, they should testify and that independent counsel could have cross-examined any one of them who did testify more freely than joint counsel chose to do. Similarly, petitioners suggest that independent counsel could have cross-examined Carter more fully, emphasizing the participation of certain petitioners and de-emphasizing the participation of his own client. Even now, however, petitioners have failed to identify how any one of them was prejudiced by taking the stand, whether or why independent counsel might have advised them differently, or in what manner either they or Carter could or would have been cross-examined more effectively by independent counsel.[2] Conclusory allegations that witnesses might have been cross-examined more effectively or that a defendant either would or would not have testified if represented by separate counsel could be made in every case of joint representation and cannot, without more, result in reversal of a conviction on the basis of ineffective assistance of counsel. A more specific demonstration of how "an actual conflict of interest adversely affected [the] lawyer's performance" (*Cuyler* v. *Sullivan*, *supra*, slip op. 13) is required.

For similar reasons, the decision by Carter to plead guilty and testify for the government cannot be thought to have triggered a Sixth Amendment duty on the part of the district court, prior to trial, to inquire once again regarding a possible conflict of interest. To be sure, the district court might have had reason to believe that the government's case was strengthened by this turn of events. But the court had

---

[2]We note that petitioners have chosen to be represented by common counsel in this Court.

no reason to believe that Carter's action would affect petitioners' defense or their relationship to one another—especially since even now, after trial, petitioners have failed to demonstrate that it did.

The Sixth Amendment to one side, petitioners argue (Pet. 6-12) that review of this case is appropriate to consider (1) when the district courts should be required, in the exercise of this Court's supervisory powers, to inquire regarding possible conflicts of interest resulting from joint representation; and (2) the consequences of a failure so to inquire. But Fed. R. Crim. P. 44(c), which became effective December 1, 1980, now requires district courts to inquire in *all* cases of joint representation. Accordingly, the asserted conflict among the courts of appeals respecting the exercise of their supervisory powers to accomplish the same result (see Pet. 6-9) is no longer of any importance.

The consequences of a failure to comply with the duties imposed by Rule 44(c)—*e.g.*, whether, as a result, the burden shifts to the government to prove that an actual conflict of interest did not affect the lawyer's performance (Pet. 8-10)[3]—should be considered in a case that actually was governed by Rule 44(c). This is not such a case, because petitioners were tried and their convictions were affirmed before that rule went into effect. In any event, as described above, the district court in this case did inquire at arraignment into the possibility of a conflict of interest, and it had no occasion to reopen the issue at a later date. Therefore, it does not appear that Rule 44(c) would have been violated even if it did apply in this case.

---

[3]Under the Sixth Amendment, of course, the burden is on the defendant to show that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler* v. *Sullivan*, *supra*, slip op. 13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

JANUARY 1981

DOJ-1981-01